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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALVAN ALJACK ADAMS, Defendant and Appellant.	B151402 (Los Angeles County Super. Ct. No. MA020102)

APPEAL from the judgment of the Superior Court of Los Angeles County. Tricia A. Bigelow, Judge. Affirmed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Alvan Aljack Adams of second degree murder and found true the allegations that he personally used and intentionally discharged a firearm. (Pen. Code, §§ 187, subdivision (a), 12022.5, subd. (a), 12022.53, subds. (b)-(d).) The trial court sentenced appellant to 15 years to life for the murder and a consecutive 25-year term for the firearm enhancement pursuant to Penal Code section 12022.53, subdivision (d),[1] for a total sentence of 40 years to life in prison.

Appellant contends on appeal that: (1) the prosecutor's negligent lack of compliance with discovery obligations prejudiced appellant's defense and violated his due process rights; (2) the trial court's exclusion of evidence of the victim's drug abuse deprived appellant of a fair trial and violated his due process rights; (3) the trial court committed prejudicial error when it refused to give CALJIC No. 2.02; (4) the trial court erred in instructing the jury with CALJIC No. 17.41.1; (5) numerous errors with cumulative prejudicial effect mandate either a new trial or a reduction of the offense to voluntary manslaughter; (6) appellant's conviction should be reversed for insufficient evidence or, in the alternative, reduced to voluntary manslaughter because there is no evidence of malice; and (7) justice requires that probation be granted in this unusual case.

FACTS

I. Prosecution Evidence

Appellant owned a home at 3322 East Avenue K-4 in Lancaster. In approximately February 2000, appellant rented out a room in his house to Marvin Lee. A short time later, Lee introduced Eugene Newbern, the victim in this case, to appellant as a prospective renter. Newbern and his girlfriend, Tara Rigby, moved into appellant's house.

Newbern's nickname was "T.C.," which stood for "Tall Cowboy" or "Total Cowboy." Newbern was six feet two inches tall, weighed 229 pounds, and had a

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[1] All further statutory references are to the Penal Code unless otherwise stated.

muscular build. Newbern was separated from his wife, Valerie Newbern.[2] When Valerie and Newbern were still living together, Newbern often wore a knife in a carrying case strapped to his belt. Newbern was occasionally violent toward Valerie. Although Valerie was sometimes afraid of Newbern, he never threatened to kill her.

In November 1999, Newbern and Olwin Allison were introduced by a mutual friend. The following January, Newbern began working on her ranch. Because Newbern had no means of transportation, Allison would drive him different places. Beginning approximately February 14, 2000, Newbern began complaining to Allison about appellant. He said appellant was trying to get him out of the house by asking for more money.

On the afternoon of February 21, 2000, the day of the shooting, appellant telephoned 911 and reported that there was a trespasser at his house. Appellant said that he owned the house, that the trespasser thought he was a tenant there, and the trespasser must have made some arrangements with Marvin Lee, who was a former tenant. Los Angeles County Deputy Sheriffs Bradley Feehan and Michael Rust responded to the call, arriving at appellant's house about 3:30 p.m. Appellant was very upset and agitated. While standing in the doorway, appellant said that Feehan needed to take action. He had a trespasser in his house and the man had to get out. When asked where the trespasser was, appellant pointed to Newbern, who was sitting on the couch watching television.

Feehan asked Newbern who he was and why he was there. Newbern told Deputy Rust his name and said that he lived there. Appellant said that he did not know Newbern, had never seen him before, and wanted him out of the house. Feehan asked Newbern if he had any identification to prove who he was and if he had any way to prove that he was actually living at the house. Appellant did not say Newbern made any threats to him, nor did appellant say that he was afraid of Newbern. Newbern did

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[2] We hereafter refer to Valerie Newbern by her first name to avoid confusion with the victim.

not have any weapon visible on his person. Newbern showed Feehan some identification and some type of receipt or money order that indicated Newbern was living at appellant's house. Newbern showed Feehan some pieces of mail addressed to him at appellant's address. Feehan believed that Newbern was living at appellant's house.

Appellant told Feehan that Newbern did not have a rental agreement. Feehan said it did not matter if Newbern had a rental agreement because Newbern had satisfactorily proved that he lived at appellant's house. Therefore, Feehan had no choice but to let Newbern stay. He also told appellant about the civil eviction process and that, if appellant did not want Newbern in the house, he could obtain a restraining order. During the entire time Feehan and Rust were in the house, Newbern did not get upset, although he said that appellant was "making up a bunch of shit about me."

Appellant followed Feehan out to his patrol car and told him he was not doing his job. Appellant told Feehan, "Next time you come out you're going to come out with the coroner." Feehan asked appellant, "What did you just say?" Appellant repeated the statement about the coroner. When Feehan asked appellant what he meant, appellant replied, "Look at the size of him. Look at the size of me. He's bigger than me, and I heard he's the bouncer at a bar."

Feehan walked back into the house and told Newbern to go away for at least a few hours to let things cool off. Newbern replied that he would do so, but that he lived there and had nowhere else to go. Feehan also told appellant to go somewhere for awhile to let things cool off. Appellant replied that he was not going anywhere. Feehan and Rust left appellant's house.

About 20 to 30 minutes after Feehan and Rust had left, appellant telephoned 911 again and said someone in his house would not let him clean out one of the renter's rooms and was threatening his life. Newbern was heard to say over the telephone, "I didn't threaten your life. Don't lie, Al." Appellant said the person in his house was putting his hands on him, pushing him around, threatening him, and refusing to allow him access to his property. The 911 operator advised appellant that

deputy sheriffs had just been out to his house and that it was a civil matter. Appellant said the courts were closed that day and he would have to go to court the next morning. The 911 operator told appellant that the same deputy sheriffs would be sent back to his house.

Appellant met Deputy Feehan in the front yard. Appellant yelled to Feehan that he had to take some action and get Newbern out of the house because Newbern had assaulted appellant. He did not mention anything about Newbern threatening him or about being afraid of Newbern. Appellant did not say that Newbern had pushed him against a wall or that he had to carry a gun because he was afraid of Newbern. Appellant did not say he was armed with a gun at that point, and he did not complain about Newbern having any weapons.

Appellant told Feehan to "fingerprint" his jacket because Newbern had pushed him. Appellant was screaming at Feehan. He said, "This time you're going to get him out of my house." Feehan did not find Newbern at the house. He told appellant he was willing to take a police report and document what appellant had said, and he would contact Newbern to hear his side of the story. Appellant yelled, "I am telling you what happened. You don't have to talk to him. He's a liar." Feehan told appellant it was a crime to make a false police report. Appellant then said he no longer wanted to make a police report but wanted Newbern out of his house. Feehan and Rust left.

Newbern went to visit his girlfriend in jail, and then telephoned Olwin Allison and asked her to pick him up. She did so at approximately 6:10 p.m., and they went to her home. At approximately 7:50 p.m., Newbern said he wanted to go home and get some clothes for the next day. Allison gave Newbern the keys and alarm remote control for her Jeep Cherokee.

Kimberly Irby lived across the street from appellant. She estimated that her front door was about 38 feet from appellant's front door. Appellant was a good neighbor and Irby never had any problems with him. Irby was standing in her front yard with her dogs at approximately 8:00 p.m. on February 21 when she saw Newbern

driving a Jeep Cherokee down the street at a high rate of speed. He pulled into appellant's driveway and got out of the Jeep and turned on the vehicle's alarm. Newbern quickly walked up to appellant's front door and went into the house. Irby heard Newbern and appellant yelling at each other and arguing inside the front door of appellant's house. After appellant and Newbern had argued for about four to five minutes, Newbern came outside through the front door and walked up to the Jeep Cherokee. Newbern put one foot inside the Jeep. He then stepped out of the vehicle, activated the vehicle's alarm and calmly walked back to the front door of the house. Newbern opened the door and started entering the house. When Newbern was about halfway through the front door, Irby heard a number of gunshots fired in rapid succession.

At the first gunshot, Irby ran back into her house. Irby looked out her front window and saw that the front door of appellant's house now was closed.

Appellant called 911 and said he had shot a male in his house because the male had threatened to kill him. Appellant identified himself, and the 911 operator told appellant that deputies would come to his house, and appellant should leave the gun in the house and come outside when the deputies arrived. Appellant said he had called earlier that day and stated that a trespasser at his house had threatened to kill him. The operator told appellant to stay on the phone until the deputies arrived. Appellant said that the person he had shot had not drawn any weapons on him that night. A short time later, the operator said the deputies were arriving at appellant's house, and appellant should put his gun down in his bedroom and go outside and talk with the deputies. Appellant then hung up the phone.

Los Angeles County Deputy Sheriff Quitman Carter and his partner Deputy Cosby arrived at appellant's house shortly after 8:00 p.m. Appellant walked out of his house with his hands raised above his head. Another deputy sheriff who had arrived at the scene, Deputy Jinright, told appellant to come over to him. Appellant complied and Jinright handcuffed appellant. Carter and Jinright, and Deputy Feehan, who also had arrived at the scene, entered the house with another deputy. Newbern's body was

lying on the floor a few feet inside the front door. A set of keys was on top of Newbern's right shoulder area near his chest. The deputies determined that no one else was in the house. They secured the premises and made sure nothing was moved. Carter went into the back bedroom and found a semiautomatic pistol on top of a chair. The slide and hammer of the gun were pulled back and all of the rounds had been expended from weapon.

Appellant was transported from his house to the Sheriff's Station in Lancaster by Deputy Sheriff Gregory Chatman. Chatman booked appellant and performed a gunshot residue test on appellant. Chatman asked appellant if he felt suicidal. Appellant replied, "No, but I am homicidal." When Deputy Chatman inquired about appellant's health, appellant said that he was disabled and had bladder cancer. After appellant said this, Deputy Chatman took appellant to a doctor. While Deputy Chatman was with appellant, appellant did not say that he had shot the victim in self-defense.

Detective Richard Tomlin of the Los Angeles County Sheriff's Department Homicide Bureau investigated Newbern's shooting. Tomlin arrived at appellant's house at approximately 11:00 p.m. on February 21. Tomlin was told that the gun was on a chair in the bedroom and that appellant had been very cooperative. Tomlin obtained a search warrant for appellant's house and began the search about one hour after he arrived at the scene. The first thing Tomlin saw upon entering the house was Newbern's body lying by the front door. Newbern's head was about four and one-half feet away from and facing the front door. His feet were facing toward the kitchen/dining room area and were about 10 feet nine inches from the threshold of the front door and about 10 inches away from the entryway into the kitchen area. Assuming Newbern fell in the same place he was found, he had not reached the entryway area to the kitchen when he was shot. There were blood spots on the floor in the area around Newbern's body. This, and the fact that there were no drag marks, indicated that Newbern had fallen in the position where his body was found.

Police found six expended shell casings in appellant's home and an expended bullet was found inside Newbern's jacket. Tomlin saw a set of keys lying on Newbern in the area of his right shoulder. It was later discovered that the keys were Olwin Allison's. Tomlin also found an unloaded .45-caliber semiautomatic handgun on top of a chair in a bedroom. A full search revealed no additional knives or guns inside the house. A representative of the Coroner's office searched Newbern's body and found a folded pocket knife in the right front pants pocket.

The autopsy performed on Newbern revealed that Newbern had suffered seven gunshot wounds. Dr. Djabourian, who performed the autopsy, assigned numbers to each wound. The numbers did not necessarily reflect the order in which the wounds were sustained. Gunshot wound No. 1 was caused by a bullet entering the front of Newbern's right hip and traveling upwards, hitting the right kidney, the liver, and the right lung, and ending up in the bony region around the spine. This wound was fatal. Gunshot wound No. 2 was caused by a bullet entering the left side of the back and traveling through the left lung, exiting the body at the upper chest at the base of the left side of the neck. The bullet reentered and lodged in Newbern's chin. This wound also was fatal. Gunshot wound No. 3 was caused by a bullet that entered Newbern's chest and traveled through his heart, perforating the spinal cord at the base of the neck. Gunshot wound No. 4 was caused by a bullet that entered the left side of the chest and then perforated some blood vessels in the armpit region and terminated in the left shoulder. Gunshot wound No. 5 started in Newbern's right lower back, went through some back muscles around the gluteal area, and exited the body. Gunshot wound No. 5 was a nonfatal wound, and it appeared that the bullet first went through Newbern's jacket before entering his body. Gunshot wounds Nos. 6 and 7 were nonfatal. Gunshot wound No. 6 was caused by a bullet that entered Newbern's right forearm and may subsequently have entered Newbern's body and caused either gunshot wound No. 1, No. 3 or No. 4. Gunshot wound No. 7 also hit Newbern's right forearm. During the autopsy, Dr. Djabourian recovered four bullets and one bullet fragment from Newbern's body.

Dale Higashi, a Senior Criminalist with the Los Angeles County Sheriff's Department Crime Laboratory, testified for the prosecution as a ballistics expert. Higashi reviewed Dr. Djabourian's autopsy report and the Coroner's Office Investigator's Report. He met with Dr. Djabourian and, at Djabourian's direction, placed trajectory rods in a mannequin to demonstrate the path of the bullets that struck Newbern. Higashi did this in order to extrapolate the relative positions of appellant and Newbern at the time appellant shot Newbern.

Higashi was of the opinion that the angles of gunshot wounds Nos. 1, 3, and 4 were not consistent with Newbern standing upright when he was shot. Rather, they were consistent with Newbern's lying flat on his back, assuming the shooter was standing up. Higashi concluded that appellant would have had to stand more than five feet away, perhaps up to 10 feet away, from Newbern when he fired the bullets that caused gunshot wounds Nos. 1, 3, and 4. Appellant could have been closer to Newbern when he inflicted wounds Nos. 1, 3, and 4 if he fired from the position of being bent over at the hips. If appellant was standing upright when he fired the bullet that caused gunshot wound No. 2, Newbern probably was bent over slightly at the waist when the bullet hit him in the back. If Newbern *was* standing when the bullet hit him, he would have had to be at a much higher elevation than appellant stood when he fired. Gunshot wound No. 5, which struck Newbern in the back, was consistent with Newbern being severely bent over when the bullet struck him, always assuming appellant was standing up when he fired the shot. The bullets inflicting the wounds to Newbern's arm, wounds Nos. 6 and 7, may have entered Newbern's body after going through his arm and thus caused the gunshot wounds numbered 3 and 4. Higashi testified that, from his observations, it would not have been possible for the gunshot wounds numbered 1, 3, and 4 to have been caused while appellant and Newbern both were standing upright on the same level and with appellant standing approximately five feet away from Newbern.

Higashi explained that many variables affect the ejection pattern of shell casings fired from a semiautomatic handgun. Therefore, the locations of expended

shell casings in appellant's house did not necessarily reflect where appellant was standing or whether he was moving or stationary when he shot Newbern. Appellant could have fired six rounds in as little as one and a half to two and a half seconds.

Higashi believed appellant must have been standing somewhere in front of Newbern when he shot him, probably somewhere in the entryway area to the kitchen or near the table in the kitchen. Because there was no soot or stippling on Newbern's body or clothing, Higashi could not determine exactly how far away Newbern was from appellant when appellant shot him. The wounds to Newbern's back were consistent with a scenario where Newbern walked into the house through the front door and continued toward the entryway, appellant pulled out a gun, Newbern saw the gun and turned around in an attempt to go back toward the front door, and appellant shot Newbern in the back. Newbern turned and ducked and was shot again. Assuming this scenario occurred, there was nothing inconsistent with appellant continuing to shoot Newbern from a distance of eight to 10 feet while Newbern was lying on the floor on his back.

Higashi testified that, when a person is in fear for his life and starts shooting, the person does not think about how many shots he is firing.

II. Defense Evidence

Appellant testified in his own behalf. He was 50 years old and had grown up in South Central Los Angeles. He had served in the merchant marines and later volunteered for the Navy, where he was a conscientious objector because he did not believe in killing people because of their political beliefs. He was honorably discharged after approximately two and a half years. Appellant later worked at a few hospitals and for the City of Los Angeles Fire Department as a paramedic. Appellant later became a building manager, and, while working on a roof, he fell and sustained eight compressed discs in his back. Appellant became disabled. He had to wear a back brace and use a cane most of the time. Appellant also suffered from emphysema and either bladder or kidney cancer, according to appellant's urologist. The cancer condition is painful.

Appellant had his home in Lancaster built in 1998. Appellant's mother lived in appellant's home until she passed away in March 1999. Some time later, appellant began looking for a roommate. Appellant's rehabilitation counselor put him in touch with Marvin Lee, a parolee. Lee began renting appellant's southwest bedroom beginning in July or August 1999. Lee signed a lease that prohibited him from bringing drugs onto the property. Lee introduced Newbern to appellant as another potential tenant. On approximately January 16 or 17, 2000, Newbern came over to appellant's house and spoke with him. Newbern said he was looking to buy a house and he wanted appellant to quitclaim his house to him and they would split the equity. Appellant said he was not interested in doing this. Newbern also told appellant he was looking for a house to stay at for a couple of weeks until another house that was in escrow closed. Appellant told Newbern he could rent the north bedroom in his house for two weeks for $150. Appellant did this because Newbern was an ex-Marine and a friend of Marvin Lee's. Lee gave Newbern a good reference.

After appellant told Newbern he could stay at the house for two weeks, he gave Newbern a rental application. On January 19, 2000, Newbern moved in together with his girlfriend, Tara Rigby. A day or two later, Newbern gave appellant a partially completed rental application. He listed his name as "T.C." and he named Lee and appellant himself as references. Every time appellant asked Newbern to sign a lease, Newbern refused.

Lee told appellant that Newbern was a bouncer at a bar and that when someone had called Newbern the "N" word, Newbern picked the man up by the neck, crushed his esophagus, and buried him in the desert. Lee also told appellant that Newbern had beaten some men to a bloody pulp and left them out in the desert. Appellant listened with "a grain of salt."

Appellant knew that Newbern carried a pocket knife and had seen it. Appellant also had seen Newbern with another knife on his right hip. One day Newbern was sharpening the knife at appellant's house, and he told appellant he could kill somebody faster with the knife than anybody could shoot him. Appellant did not take this as a

threat, but he told Newbern, "Let's not find out." Newbern also possessed a bronze or gold knife, a Swiss Army knife, and a machete. Sometimes Newbern walked around the house swinging the machete.

Once, appellant heard yelling in the house. Shortly thereafter, Newbern's girlfriend, Tara Rigby, knocked on appellant's bedroom door. Appellant saw a little trail of blood running down the left side of Rigby's mouth. Rigby told appellant that Newbern had hit her. When appellant offered to call the police, Rigby said, "No, he'll kill me."

Appellant discovered that Lee was bringing drugs into the house, which was a violation of the lease agreement. Lee said if appellant had him arrested or called his parole officer, he would kill appellant. Appellant telephoned Lee's parole officer and reported him. Later the same day, January 27, the parole officer came over to appellant's house and arrested Lee. On the next day, Lee called appellant from jail and was very apologetic. He said he wanted to reconcile his differences with appellant. Newbern then paid appellant Lee's rent for the month of February with a money order.

Newbern told appellant that he was a "punk" for having Lee arrested. Newbern also told appellant he was going to get a bunch of people together and beat him up and then drop off his body in the desert. Newbern threatened to burn appellant's house down. Newbern said he had been in a special bomb unit in the Marines and knew how to make bombs. Newbern stated he would blow up appellant's house with appellant in it. Newbern threatened appellant almost every day and used obscenities toward him. Appellant tried to avoid contact with Newbern. Newbern's threats were only verbal -- he did not threaten with a knife. Appellant started carrying his gun whenever Newbern was in the house because he thought his life was in danger.

On February 1, 2000, Newbern had given appellant $150. Appellant thought this was in payment for the two weeks of rent from January 19 to January 31. Rigby never gave appellant any money.

Rigby told appellant that Newbern was sleeping with "Allie." She also told appellant that Newbern had made threats against him, and appellant should "watch [his] back." Because Rigby was drunk, appellant did not take what she said seriously. Rigby said Newbern was a hit man for the Mafia, and that Newbern had been fired as a bouncer at several bars because he was too violent. Rigby also told appellant about Newbern beating up people and dropping them off in the desert. Appellant did not take this seriously.

Appellant got out of bed at approximately 9:00 or 9:15 a.m. on February 21 and went into the kitchen to get a cup of coffee. He saw Newbern sitting on the couch with his arm around an unknown female. Appellant told Newbern privately that he could not tolerate Newbern being in the house and constantly threatening him, and it was time for Newbern to pack up and leave. Newbern said he would "get on it." Appellant also asked for rent money. During the conversation, Newbern again said he was going to burn down appellant's house with appellant in it. Appellant said he was tired of hearing about it, and he returned to his bedroom. He locked his door and went back to sleep. He had his gun in his bedroom.

At approximately 3:00 p.m., appellant went into the kitchen to get some coffee. Appellant had his gun in his left pocket. While appellant was in the kitchen, Newbern was sitting in the living room. Newbern yelled to appellant that he would give him the rent when he decided to do so, and appellant should never come up to him when he had someone in the house and demand anything from him. Newbern again said he was going to blow up the house. Appellant said, "That's it." He went to his bedroom and telephoned 911. He told the 911 operator that he wanted the police to come over to his house and take Newbern away.

Deputies Feehan and Rust arrived at appellant's house about five minutes after appellant's 911 call. Appellant identified himself to the deputies and said he had a trespasser on the property who was threatening to burn the house down with appellant in it. Appellant also told the deputies that the trespasser had been increasingly more violent ever since appellant had the trespasser's friend, Marvin Lee, arrested. Deputy

Feehan told appellant that the police would decide who, if anyone, got arrested. Appellant said he did not know who Newbern was because he only knew him by the name "T.C.," which stood for Tall Cowboy. Feehan said that if Newbern got mail there he did not need a residential lease. Feehan asked Newbern if he received any mail at appellant's house, and Newbern said he did. Appellant began getting sarcastic with Deputy Feehan, telling him he would move to Feehan's house. When Deputy Feehan got upset, appellant told him, "Well, see big guy, you don't like it when the shoe is turned on your foot, right?" Deputy Feehan replied that he and his partner were busy and were leaving.

Appellant followed the deputies outside. Deputy Rust told appellant he should be very careful because Newbern could turn around and sue him, and appellant would lose the house. Appellant complained that he did not like the way the deputies were doing their job. Deputy Feehan told appellant to calm down and that Newbern did not seem violent. As the deputies left the property, appellant told them that the next time they came back they should bring a body bag because Newbern was going to kill appellant.

When appellant went back into the house, Newbern told him, "Well, you've really done it this time, pal. You're really going to pay for this one." Appellant hurried back to his bedroom and called the Lancaster Sheriff's Station. Appellant demanded to speak with the watch commander to complain about Deputies Feehan and Rust. However, he did not get any assistance. About half an hour later, appellant entered Lee's bedroom and started cleaning out the room because he had a lead on a renter for the room. Newbern stormed into Lee's room and said he had spoken with Lee, and Lee had said he wanted Newbern to clean out the room. Newbern picked appellant up and pinned him against the wall. Newbern said if appellant touched anything in the room it would be the last time he touched anything. When Newbern said this, appellant put his hand into his pocket, clicked off the safety on his gun, and told Newbern to back off. Newbern was able to feel the barrel of appellant's gun. He let appellant down and went into the hallway and toward the living room.

Appellant made his second 911 phone call, telling the operator that "T.C." would not let him clean out one of his room's and was threatening his life. Newbern was standing in the hallway listening to appellant's conversation. Newbern said appellant was "a fucking liar." Newbern then turned around and left the house.

The 911 operator told appellant that deputies had just been out to the house and it was a civil matter. Appellant felt completely helpless. Appellant told the 911 operator that his life was in danger. Appellant thought that Newbern was capable of killing him with very little effort because Newbern had been trained to kill in the Marines. Appellant also thought he would be able to pull out his gun and defend himself if Newbern tried to throw a knife at him.

After his 911 call, appellant locked the door in his bedroom and stayed there until Deputies Feehan and Rust returned. Appellant ran up to Deputy Feehan and said that he wanted Newbern arrested because Newbern had just assaulted and battered him, pinning him and pushing him up against the wall. Deputies Feehan and Rust then checked the house and yard and determined that Newbern was not there. Appellant told Deputy Feehan that he had to arrest Newbern. Deputy Feehan said he would arrest Newbern but first was going to talk to him, and if Newbern said that appellant had put a hand on him, he would come back and arrest appellant. Appellant said he could not have a physical altercation with anyone because he was disabled. Deputy Feehan warned appellant that it was against the law to make a false police report. Appellant felt hopeless and threatened and in fear for his life because he thought the deputies did not believe him.

After the deputies left, appellant telephoned his half sister, Arlene Elder, in Ohio. Appellant sounded very anxious and frightened. Appellant said that the police told him it was not their job to evict his renter. Appellant stated he felt defeated. He told his sister about the incident that occurred when appellant tried to pack Lee's things. Elder thought that appellant sounded terrified. Appellant said he was locked in his bedroom and had his gun.

Appellant telephoned a friend of his, Ron Alcorn, about 5:20 p.m. He left a message on Alcorn's answering machine in which he said that T.C. had threatened to kill him and Alcorn should call the police if he did not hear from appellant in 96 hours. Appellant said this because he wanted someone to notify the Sheriff's Department in the event that Newbern and his friends got together and dropped appellant off in the desert.

Appellant got onto the Internet and unsuccessfully tried to communicate with another of his sisters and a man named Greg Gabriel. On cross-examination, appellant acknowledged that, at some point that evening, he dragged the television set from the living room to the back bathroom. He stayed on the Internet until about 8:00 p.m. and then went into the kitchen and made himself some coffee and toast. While appellant was in the kitchen, Newbern came back to the house. Newbern unlocked the front door and appellant saw him walk down the hallway toward Lee's bedroom. Appellant took his gun out of his pocket and pointed the weapon toward the ground. Appellant "knew" that it was "a situation of imminent danger," and that Newbern was afraid of his gun. Appellant saw Newbern leave Lee's bedroom and go into his own bedroom, where he remained for approximately three minutes. He then went to appellant's bedroom and knocked on the half-open door. Newbern yelled, "Hey, mother-fucker where are you?" Appellant replied, "I am right behind you." Appellant was standing in front of the stove in the kitchen. Newbern turned around and saw appellant standing by the stove with his gun in his hand. Newbern said, "Okay, is that the way it's going to be?" Appellant replied, "Yes. I want you off the property now." Newbern responded, "Okay. I am going to get mine and we're going to settle this right now, you son of a bitch."

Newbern walked into the living room. Appellant thought Newbern was going to the front door. Appellant started going down the hallway. Just as he got past the entryway, Newbern came up behind him, and appellant shot him from a distance of five feet. He had never planned on shooting him. Newbern had come "lurching" at appellant with his right hand up and holding what appellant thought was a knife.

Newbern did not turn his back to appellant and bend over just before appellant shot him. Appellant ducked and was bent forward at the waist, and he raised his hand and fired upward when he shot Newbern. Appellant did not recall how many shots he fired. He was aiming for Newbern's arm when he fired the first shot. Newbern kept coming at appellant, and appellant aimed for the center of Newbern's torso when he fired the remainder of the shots. By the time appellant fired the fifth shot, Newbern was only about three feet away from appellant. Appellant did not recall shooting Newbern in the back. It was completely dark in the living room area when appellant shot Newbern. The bathroom light and the light in the hallway by the garage were the only lights on. Appellant had had enough light from the bathroom light to make himself toast and coffee in the kitchen.

Immediately after appellant shot Newbern, he walked over to Newbern's body and saw Newbern's right hand come down and drop a set of keys on Newbern's right shoulder. The keys were what appellant had believed to be a knife. Appellant telephoned 911. Appellant did not try to do cardiopulmonary resuscitation on Newbern because Newbern had hepatitis. In any event, Newbern was already dead.

Appellant did not hide his gun or move the expended shell casings. He put his gun down on the chair in his bedroom as requested by the 911 operator. He left his home voluntarily and was handcuffed by a deputy sheriff. He told the deputies that he wanted his right hand put in a plastic bag so a gunshot residue test could be performed on that hand. When appellant was booked at the Sheriff's Station, he was being sarcastic when he told Deputy Chatman that he was not suicidal but homicidal.

Appellant did not think it was possible for his neighbor, Irby, to have heard appellant and Newbern's conversation from across the street. After Newbern came into the house, appellant never saw him leave the house again. Appellant did not have a five-minute argument with Newbern before the shooting, and he and Newbern were not yelling and screaming at each other. Appellant acknowledged that Irby would have an unobstructed view of appellant's front door from her front porch if there were no cars parked on the street.

Appellant had never planned to kill Newbern. He felt very bad about Newbern's death because his life could have been saved. Appellant could not see how anything could have been done differently unless Deputies Feehan and Rust would have helped him and arrested Newbern. The only other time appellant ever was arrested was on a warrant for an unpaid traffic ticket in the 1960s. The last time appellant was in a fistfight was in high school. Since then, he had never committed an act of violence until he shot Newbern.

William Paulson was a defense investigator in the instant case. On March 1, 2000, Paulson searched Newbern's former bedroom. He found two knives inside a cardboard box at the foot of the bed and a Swiss Army knife in the closet. Paulson spoke with Newbern's wife, Valerie, on November 3, 2000. Valerie said that Newbern had been violent toward women. She said that Newbern had hit her more than once, and one time she made a police report because of Newbern's abuse. She said Newbern always carried a large knife with him, and she knew someone finally would hurt or kill him because of his attitude toward people. He liked to scare people.

Paulson determined that the distance from Irby's front porch to appellant's front porch was 150 feet. A person on the front porch of Irby's house could see appellant's front door and could see appellant's front door being opened or someone standing at the door. There were lights on both the porch and street.

Walter Eagles and appellant had been friends for 28 years. After appellant was arrested, he asked Eagles to go to his house and obtain some personal items for him. While in the house, Eagles found a large knife on top of the bed in Newbern's bedroom. Eagles had never known appellant to be violent and had never seen him argue with anyone or beat up anyone. Eagles believed appellant was a compassionate person.

Beginning sometime in 1998, Darlene Edelman rented a room to Newbern. Newbern was a violent and mean person. When he was living at Edelman's, he would pull out his knife and sharpen it and pick his fingernails with it. Newbern said he was sharpening the knife in case he ever had to use it. Newbern also carried a pocket knife

that he sharpened. Once, when Edelman requested Newbern's back rent money, Newbern looked at her with "evil eyes" and sharpened his knife. Edelman felt threatened.

Edelman once confronted Newbern after he told a friend of Edelman's that he and Edelman were sleeping together. Newbern denied saying this and wanted to confront Edelman's friend. Newbern and Edelman went to Edelman's friend's apartment, and Newbern had a gun. He pounded on the door but no one answered. That same evening, Newbern's wife came to the bar where Newbern and Edelman were. She told Edelman that she was Newbern's wife and that Newbern had hepatitis. Newbern yelled that he was going to kill his wife and he wanted to get his gun. The next day Edelman told Newbern to move out. Newbern became violent. He hit Edelman and ripped off her clothes. This went on for about two hours. When Edelman tried to leave the house, Newbern slammed the door on her hands. Edelman told Newbern she was going to call the Sheriff's Department, and Newbern said he would kill her if she did. Newbern left the house. Edelman reported the incident. Edelman had a nervous breakdown as a result of the incident and was hospitalized. When she returned home, Newbern came over and said he wanted to pick up his things. Newbern entered the house, hit Edelman and shoved her into the closet.

When Edelman subsequently moved to the Western Skies Mobile Home Park, she found that Newbern and his girlfriend Rigby were living there. Rigby told Edelman that Newbern had beaten her up. Edelman saw bruises on Rigby's arms. Every time Edelman saw Newbern at the trailer park, he was wearing his knife.

Edelman's fiancé, David Cook, knew Newbern from the Calico Saloon, where Cook worked. Cook had served three terms in prison. He believed Newbern was a very violent person. On one occasion Newbern became violent with a female bartender at the Calico who would not serve him any liquor because he was drunk. When Newbern was about to slap the female bartender, Cook and another man had to forcibly remove Newbern from the premises. During the altercation, Newbern pulled a knife on Cook. During the time that Cook knew Newbern, Newbern always carried

a gun in his boot and a knife in a sheath on his belt. On another occasion at the Calico Saloon, Cook and Newbern had a fistfight after Cook would not extend Newbern's bar tab. After Cook told Newbern not to come back to the bar, Newbern said he was going to wait for Cook and "kill [his] ass."

Vickie Steele manages the Western Skies Mobile Home Park in Lancaster. In approximately 1997, Steele hired Newbern as a maintenance man at the mobile home park. Newbern was employed there for about eight or nine months. After his employment ended, he still lived at the trailer park. Newbern never was violent with Steele. However, he showed her his violent look by "scrunching up" his face a little bit. One girlfriend of Newbern's told Steele that Newbern had tried to stab her, and she had called the police and gone to the hospital. Newbern's girlfriend Rigby told Steele that Newbern had hit her in the nose. Steele saw that Rigby's nose was red. Steele recalled that Newbern always carried a large knife on his hip. Newbern told Steele that no one would ever hurt him as long as he had his knife, or something to that effect. One time Newbern told Steele that he had threatened to blow up a bar, and he was upset because "they" had come to his house and arrested him even though it was not a real bomb. Newbern told Steele that he was in a special unit in the Marines and he knew karate. He was specially trained for fighting and bomb making. Newbern was always very cordial to Steele and she never actually saw him threaten or yell at anyone.

On cross-examination of appellant, the prosecutor elicited that, on February 9, 2000, appellant had deposited in his bank a Continental Express Money Order dated February 2, 2000, for $350. The money order showed that the purchaser was Eugene Newbern and that appellant was the payee. Appellant signed the money order before he deposited it into his bank account. At a prior proceeding in the instant case, appellant testified that he had never seen that money order and denied ever having seen Newbern's receipt for the $350 money order. Also during his testimony at the

prior proceeding, appellant never mentioned anything about his belief that Marvin Lee had given Newbern $350 to pay Lee's rent while Lee was in jail.[3]

III. Rebuttal

After appellant testified at a prior proceeding that he had never seen the money order receipt that Detective Tomlin received from Valerie Newbern, Tomlin traced the origination of the money order. A copy of the cancelled money order showed that Newbern had purchased the money order for $350.

DISCUSSION

I. Discovery

Appellant complains that the prosecutor's failure to turn over to the defense a ballistics expert's report until a week before trial constituted a prejudicial violation of section 1054.1. Appellant also argues that the prosecutor's delay denied appellant his right to due process and a fair trial.

A. Proceedings Below

During a pretrial hearing on April 30, 2001, defense counsel told the court that he had received a report from the People's firearms expert. Counsel stated that "all it basically says is what the coroner originally testified to. I don't see that it adds anything." Defense counsel wished to know if anything was to be added to the report, and the prosecutor said he would speak with the expert, Dale Higashi, when the expert returned from leave on the following day. The prosecutor would then provide defense counsel with any information. The prosecutor explained that the only report he had was the one defense counsel also had, and that he planned to use the expert's testimony to rebut appellant's version of events. Defense counsel then informed the court that he had received the report, dated January 29, 2001, approximately a week

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[3] The prosecution had shown during its case-in-chief that, after the shooting, Valerie Newbern gave Deputy Tomlin a purchaser's copy of a money order for $350 dated February 2, 2000. The money order was payable to appellant, and Newbern's name was handwritten on the money order as the purchaser.

before, adding: "I knew that Higashi was going to testify for a few months now, so I really don't have a problem with this report and this opinion, which essentially said the decedent was facing away from the shooting during [shots] number 2 and 5, and the decedent was facing the shooter during 1, 2, and 4. [¶] It's simplistic and I don't have a problem. But if we have diagrams and photos, and computer layouts, I'm going to have a problem with it." The prosecutor did not know if Higashi had prepared any diagrams. The court asked the prosecutor to find out.

Opening argument began on May 3, 2001. On May 8, the prosecutor told the court that he had met with Higashi that morning, and Higashi had shown him photographs that he intended to use in his testimony. The photographs depicted a mannequin with probes placed inside to show bullet trajectories. Higashi had used the mannequin during his meeting with the coroner. Defense counsel objected to the use of the photographs, stating: "My objection, Your Honor, is the fact that we knew Mr. Higashi was going to testify a few months ago. I didn't get the report from him, after I requested anything from him continually. [¶] I didn't get the report until about a week before trial started or so. I don't recall the specific date. Now he's just bringing the photos in. [¶] I have my own firearms expert. Mr. Desederio, who is a listed witness. [¶] I would move to exclude the photos, based on the fact I was not given those photos until now, and we're well into trial and testimony. And I would have to have my firearms' [*sic*] guy look at those photos." Counsel noted that the photographs were similar to the coroner's photographs.

The court, after examining the photographs, stated that there was no new information in Higashi's photographs, and that, although the source of the information was new, the information had already been disclosed to the defense. The court then asked the prosecutor why he had not turned over the photographs earlier, and the prosecutor repeated that he had not received them till that morning because of Higashi's absence due to paternity leave. After a rather lengthy explanation by the prosecutor, the court asked him why the report had been late. The prosecutor replied that he had turned over the report as soon as he received it. Higashi had told the

prosecutor that the report was actually prepared on February 7, but it then went through a review process. It was not approved until April 6.

When the court asked defense counsel if the harm claimed was that the defense expert might not have enough time to prepare, defense counsel replied that it was. The prosecutor pointed out that the defense expert had the autopsy report and the coroner's photographs, which were essentially the same as the photographs of the mannequin. The information was therefore the same as that possessed by the defense for over a year.

The trial court found there was no intentional violation of a discovery order and no improper intent to gain a tactical advantage. The court then stated: "The question is are any remedies appropriate for this disclosure. [¶] It sounds to me like if these pictures were to accompany the report, they should have been turned over at least at the time the report was." The court stated it was inclined not to order exclusion, but indicated it would grant the defense expert any continuance required and would consider giving CALJIC No. 2.28.[4] The prosecutor interjected that he would not use

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[4] CALJIC No. 2.28 states: "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. [Concealment of evidence] [and] [or] [[D] [d]elay in the disclosure of evidence] may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the [People] [Defendant[s]] ___ [concealed] [and] [or] [failed to timely disclose] the following evidence: ___ [¶] Although the [People's] [Defendant's] ___ [concealment] [and] [or] [failure to timely disclose evidence] was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any [concealment] [and] [or] [delayed disclosure] are matters for your consideration. However, you should consider whether the [concealed] [and] [or] [untimely disclosed evidence] pertains to a fact of importance, something trivial or subject matter already established by other credible evidence. [¶] [A defendant's failure to timely disclose the evidence [he] [she] intends to produce at trial may not be

the photographs if the court even considered reading CALJIC No. 2.28. He would therefore prefer to use only the coroner's photographs. At that point, the discussion was closed, and Higashi's testimony began. Higashi referred to the coroner's photographs when discussing the various gunshot wounds, and no further objections to his testimony were heard.

B. Applicable Authority

The People have both a constitutional and statutory duty to disclose information to the defense. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378; *People v. Bohannon* (2000) 82 Cal.App.4th 798, 804 (*Bohannon*).) The constitutional duty arises under the due process clause of the United States Constitution and requires the prosecution to disclose any material evidence exculpatory of the defendant. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) This duty is independent of the statutory duty. (*Izazaga v. Superior Court*, *supra,* at p. 378; *Bohannon*, *supra*, at p. 804.)

Statutory provisions for reciprocal discovery in criminal cases are contained in sections 1054 through 1054.8. Section 1054.1 requires the prosecutor to disclose specified categories of information "if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies." Section 1054.1, subdivision (f), describes the category of "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

Section 1054.7 provides for the timing of the discovery obligation, in pertinent part as follows: "The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied,

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considered against any other defendant[s] [unless you find that the other defendant[s] authorized the failure to timely disclose].]

restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. . . ."

Section 1054.5 provides sanctions for violations of section 1054.1. (*Bohannon*, *supra*, 82 Cal.App.4th at p. 805.) These sanctions are available only during the trial court's jurisdiction of a criminal case. (*Ibid*.) "To prevail on a contention made on appeal from a judgment of conviction on the grounds of violation of the pretrial discovery right of a defendant, the defendant must establish that the information not disclosed was exculpatory and that '"there is a reasonable probability that, had the evidence been disclosed . . . , the result of the proceedings would have been different."'" (*Ibid*.)

C. No Violation of Due Process

As the narration of the proceedings in the trial court shows, the defense complaint below almost exclusively related to the photographs that Higashi took of the mannequin. Prior to trial, counsel stated he had known for months that Higashi was going to testify, and he initially voiced no complaints about the lateness of the report itself. Counsel admitted that the report did not contain anything new, and he said he did not have a problem with either Higashi's report or his opinion. Counsel moved to exclude only the mannequin photographs. The court offered appellant a continuance for his expert to look at the photographs and said it would consider reading CALJIC No. 2.28. At that time, the prosecutor withdrew the photographs.

Counsel did not request a continuance or an instruction because of Higashi's report. Since the court found no discovery violation, the defense was not entitled to CALJIC No. 2.28. The record shows that defense counsel did not subsequently request the instruction or a continuance.

We conclude that appellant has failed to meet his burden of showing prejudice caused by the prosecutor's delay in producing the report. (*People v. Reyes* (1974) 12 Cal.3d 486, 502.) The court and both parties agreed that the information in the report

was duplicative of information already provided by the coroner. There was no denial of due process due to a failure to disclose exculpatory evidence. (See *Bohannon*, *supra*, 82 Cal.App.4th at pp. 806-807.) There is no reasonable probability appellant would have obtained a different result had the evidence been disclosed sooner. (*Id*. at p. 807.)

II. Exclusion of Victim's Drug Use

Appellant argues that the trial court abused its discretion by excluding evidence of the victim's drug use after the prosecutor elicited from the defense investigator that he went to search appellant's house for drug paraphernalia as well as weapons. According to appellant, the court erred by not allowing defense counsel to take advantage of this opened door by exploring the issue of Newbern's drug use as a cause of the animosity between Newbern and appellant. Also, the jury was left with the false impression that, although the investigator looked for drugs and drug paraphernalia, he did not find any.

A. Proceedings Below

At an evidentiary hearing prior to trial, the prosecutor told the court he wanted to exclude any mention of the victim's alleged prior drug use. The prosecutor stated there was no evidence the victim was under the influence on the day of the shooting. He believed mention of the drug use would not be relevant and would be more prejudicial than probative under Evidence Code section 352. Defense counsel stated that he did not intend to bring up Newbern's drug use. The court asked whether appellant had any proof that Newbern was under the influence of drugs on the date of the shooting, and counsel replied there was only appellant's personal opinion. Defense counsel said he had no proof of any specific incident of Newbern's drug use when interacting with appellant. The court ruled that the evidence was inadmissible.

The first witness called by the defense was William Paulson, the defense investigator. Defense counsel did not ask Paulson any questions about drugs or drug paraphernalia found when Paulson searched appellant's residence; instead, he concentrated on the weapons found. During cross-examination, the prosecutor asked

Paulson what else he was looking for during the search, other than weapons and the rental agreement. Paulson answered: "Drugs, drug paraphernalia." The prosecutor asked if there was anything else, and Paulson said he did not recall offhand.

After the prosecutor's cross-examination, defense counsel argued to the court that the drug paraphernalia found in Newbern's room should now be admitted, since the prosecutor opened the door by asking Paulson about the object of his search in addition to previously playing a tape of appellant's 911 call that referred to drugs. Counsel urged that it was necessary to rehabilitate Paulson and show that he did find drug paraphernalia; specifically, a hypodermic kit. Counsel stated the evidence was relevant to show that Newbern was breaking the house rules, as appellant had told Deputy Feehan. The court stated that the issue was not whether Newbern was trespassing on appellant's property, but rather, why Newbern was shot. The court determined that the evidence was not relevant and, moreover, it was more prejudicial than probative under Evidence Code section 352.

B. Applicable Authority

Only relevant evidence is admissible. (Evid. Code, § 350.) All relevant evidence is admissible, except as otherwise provided by statute. (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177.)

Evidence Code section 352 provides an exception to the admission of relevant evidence, stating that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court's discretion to exclude or admit relevant evidence under the criteria of Evidence Code section 352 must not be disturbed on appeal unless there is a showing that the court used its

discretion in an "'arbitrary, capricious or patently absurd manner.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

C. No Abuse of Discretion

We conclude the evidence of Newbern's drug abuse had no tendency in reason to establish a material fact in the instant case and was therefore not relevant. Even if the evidence were relevant, the trial court properly excluded the evidence of the kit under Evidence Code section 352.

The record shows that the autopsy drug screening found no drugs in the victim's system at the time of his death. Defense counsel admitted he could not offer any proof that Newbern was under the influence of drugs at the time appellant alleges he felt threatened, or indeed at any other time. As the trial court pointed out, the "hype kit" that Paulson allegedly found in Newbern's bedroom may not have belonged to Newbern.

In any event, appellant was not prejudiced by the exclusion of this evidence. There was ample other evidence presented by defendant to cast aspersions on the character of the victim. Defense witnesses testified to numerous instances of violent acts by Newbern, all of which served to highlight Newbern's reputation for violence. Appellant even testified that Newbern had broken the house rules by bringing drugs into the house, which is the information the defense sought to impart to the jury. In light of the foregoing, it is not reasonably probable appellant would have obtained a more favorable result if the trial court had allowed in the evidence of the "hype kit" or Newbern's alleged drug use.

III. CALJIC Nos. 2.01 and 2.02

Appellant contends that, "[b]ecause circumstantial evidence of appellant's state of mind was the chief issue at trial, and because the jury was not instructed at all on this specific point, it cannot be said beyond a reasonable doubt that the omission of

CALJIC No. 2.02[5] did not contribute to the verdict." Appellant argues his conviction should therefore be reversed.

A. Proceedings Below

In discussing proposed jury instructions with the prosecutor and defense counsel, the court stated that CALJIC No. 2.02 and CALJIC No. 2.01[6] were mutually exclusive. The court chose to give CALJIC No. 2.01 because it was inclusive of all

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5 CALJIC No. 2.02 reads as follows: "The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count[s] ___, ___, ___ and ___], [or] [the crime[s] of ___, ___, ___, which [is a] [are] lesser crime[s]],] [or] [find the allegation ___ to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

6 In its entirety, CALJIC No. 2.01 provides: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

evidence that could be considered circumstantial, and "everything here is based on circumstantial evidence. Except for the defendant's testimony, the People's entire theory is based on circumstantial evidence. [¶] If I gave only CALJIC No. 2.02 it would only go to the issue of the specific intent or mental state." Defense counsel argued that appellant preferred CALJIC No. 2.02 "based on the nature of this crime and the fact that the whole issue here is Mr. Adams' [*sic*] state of mind, whether he had the specific intent and malice aforethought to murder Mr. Newbern." The court replied that, if it gave CALJIC No. 2.01, "because the People's case is based on circumstantial evidence -- and actually, much of the evidence that's going to have to be proved even in your case is based on circumstantial evidence as well; whether or not the bullet patterns matched what the defendant said. [¶] I would not, like I said, preclude you from arguing specific intent or mental state. I think it's included in 2.01, and I am going to give 2.01. They are mutually exclusive, and it's more inclusive to give 2.01."

B. Applicable Authority

The use of CALJIC No. 2.02 instead of CALJIC No. 2.01 is proper when the defendant's mental state is the only element of the offense resting substantially or entirely on circumstantial evidence. (*People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Honig* (1996) 48 Cal.App.4th 289, 341.) CALJIC No. 2.01 is the more inclusive instruction. (*People v. Marshall*, *supra*, at p. 849.)

C. Any Error Harmless

In the instant case, although many of the issues to be determined by the jury largely related to appellant's mental state, there were elements that depended on circumstantial evidence.

We only partially agree with respondent's argument that the issue of justification, which is determinative of whether the homicide was lawful, did not depend on appellant's mental state. Justification requires that the defendant "actually and reasonably" believes in the fact of imminent danger and the necessity of using force. (See CALJIC No. 5.12.) There were, however, some elements of justification

that did not involve appellant's mental state and that required the use of circumstantial evidence. These included whether appellant created the circumstance that justified his adversary's attack, and whether the right of self-defense ended at some point because there was no longer any apparent danger. (See CALJIC No. 5.12.) Additionally, one of the elements of second degree murder is that "[t]he natural consequences of the [intentional] act" (which constitutes the first element) "are dangerous to human life." (See CALJIC No. 8.31.)

We need not search for more elements that did not relate to appellant's mental state, however, because we conclude that, even if the court erred in choosing CALJIC No. 2.01, appellant suffered no prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Reversal is required only if it appears, after review of the entire record, that it is reasonably probable appellant would have received a more favorable result if the instruction had been given. (*People v. Cox* (1991) 53 Cal.3d 618, 668.)

The omission of CALJIC 2.02 did not leave the jury uninstructed on any aspect of the case. As the more inclusive instruction, CALJIC No. 2.01 adequately advised the jury as to how to evaluate circumstantial evidence of intent. (*People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1142 [where trial court gave "more inclusive" CALJIC No. 2.01, refusal to give 2.02 not prejudicial error].) Moreover, the court gave instructions on the mental states as elements of the charges and included offenses, instructed the jury to consider all instructions as a whole and in light of the others (CALJIC No. 1.01), and explained the difference between direct and circumstantial evidence (CALJIC No. 2.00). (*People v. Bloyd* (1987) 43 Cal.3d 333, 352; *People v. Lee* (1990) 220 Cal.App.3d 320, 328.) There is nothing in the record or in the jury queries to indicate it may have been misled or confused as to how to deal with circumstantial evidence of appellant's mental state. Accordingly, we conclude a result more favorable to appellant would not have resulted if CALJIC No. 2.02 had been given instead of CALJIC No. 2.01. Therefore, the error was not prejudicial. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Lee*, *supra*, at p. 328.)

IV. CALJIC No. 17.41.1

Appellant argues that the trial court erroneously instructed the jury with CALJIC No. 17.41.1, which he labels the "juror snitch instruction." He claims that the instruction interferes with a defendant's right to the independent judgment of individual jurors as required by the Sixth Amendment. Because the instruction creates structural error, he argues, he is entitled to a reversal.

The propriety of giving CALJIC No. 17.41.1 is a question that will ultimately be decided by our Supreme Court, which has granted review in a number of cases. (E.g., *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted Aug. 23, 2000, S088909; *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted Apr. 26, 2000, S086462.) It is axiomatic, however, that the jury has no right to disregard the law. Therefore, it is not improper to instruct the jury that it must follow the law. (See *People v. Cline* (1998) 60 Cal.App.4th 1327, 1335.) The California Supreme Court has recently reiterated that "'[c]hampioning a jury's refusal to apply the law as instructed is inconsistent with the very notion of the rule of law.'" (*People v. Williams* (2001) 25 Cal.4th 441, 462.) And, "[j]ury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law." (*Id*. at p. 463.)

Even if the giving of CALJIC No. 17.41.1 were erroneous, it would not rise to the level of structural error, and automatic reversal is not required. The instruction does not affect "'the framework within which [a] trial proceeds'" or render the trial unreliable and unfair. (*People v. Flood* (1998) 18 Cal.4th 470, 493.) Unless a juror commits the misconduct specifically referred to, the instruction is unlikely to have an impact on the trial. The burden is on appellant to show not only error but also prejudice resulting from the error, and appellant has not done so. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 834-836.) In the instant case, there was no indication of holdout jurors, and no judicial inquiry into the specifics of the deliberative process. "[B]y virtue of the California Constitution, reversal is not warranted [for misdirection

of the jury] unless an examination of 'the entire cause, including the evidence,' discloses that the error produced a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) This test is not met unless it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred. [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 149; see also *People v. Molina* (2000) 82 Cal.App.4th 1329, 1331-1335 [assuming giving CALJIC No. 17.41.1 constitutes constitutional error, it is not "'structural error'" and does not require reversal per se].)

Therefore, employing the harmless error standard most favorable to appellant (*Chapman v. California* (1967) 386 U.S. 18, 24), we conclude appellant suffered no prejudice, and his argument is without merit. (*People v. Molina, supra*, 82 Cal.App.4th at p. 1332.)

V. Cumulative Error

Appellant argues that his was a close case in which cumulative errors generated irreparable prejudice and deprived him of a fair trial. He states that there was not overwhelming evidence of guilt, and the question of intent was hotly disputed. Appellant points out that his first trial ended in a hung jury.

We have concluded that there was no error in appellant's first three contentions, and, if the refusal to give CALJIC No. 2.02 was error, it was harmless. We do not agree with appellant's contention that his was a close case with a dearth of evidence of the required mental state. The record showed that appellant carried a gun with him all day long on the day of the shooting, and that he had done so for some period of time. The record showed that appellant had antagonized Newbern by calling the police about him twice and that he had moved the television out of the living room so that Newbern could not use it. Evidence from the neighbor, Kirby, showed that Newbern did no more than enter the front door when he was met with gunfire. The fact that Newbern was shot six times and that some of the shots may have been fired while his back was turned or while he was lying on the floor was also indicative of mental state. In sum, there was no lack of evidence of a mental state consistent with the jury's finding of second degree murder.

We conclude there was no cumulative effect warranting reversal. (*People v. Mayfield* (1993) 5 Cal.4th 142, 197 [finding of several flaws not sufficient to persuade court that, had flaws not occurred, there was a reasonable possibility defendant would have achieved a better result].)

VI. Sufficiency of the Evidence of Malice

A. Appellant's Argument

Appellant claims there is insufficient evidence as a matter of law to sustain a second degree murder conviction. He argues that the prosecution did not carry its burden of proving the absence of justification beyond a reasonable doubt. Therefore, appellant is entitled to a judgment of acquittal. In the alternative, the murder conviction should be reduced to manslaughter because appellant presented ample evidence of his mental state that precluded a finding of malice. This evidence includes appellants two 911 calls, Newbern's history of violence and threats, and appellant's good character and lack of a prior criminal history. According to appellant, the court erred in relying on the ballistics evidence in denying his motion to reduce his offense to manslaughter.

B. Applicable Authority

The standard of appellate review for sufficiency of evidence was articulated in *People v. Johnson* (1980) 26 Cal.3d 557. When an appellate court seeks to determine whether a reasonable trier of fact could have found a defendant guilty beyond a reasonable doubt, it "'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*Id*. at p. 576.) The court does not limit its review to the evidence favorable to the respondent, but must resolve the issue in light of the whole record. (*Id*. at p. 577.) "Substantial evidence" is evidence that is "reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id*. at p. 578.) Given this court's limited role on appeal, appellant bears an enormous burden in arguing insufficient evidence to sustain the verdict. If the verdict is supported by substantial

evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

C. Evidence Sufficient

Appellant failed to convince the jury that his killing of Newbern was lawful and justified. The jury was instructed that a killing is justifiable self-defense when the person who does the killing reasonably believes there is imminent danger the other person will kill him or inflict great bodily injury, and that it is necessary under the circumstances for him to use force or other means in self-defense. (CALJIC No. 5.12.) There was substantial evidence from which a reasonable jury could determine that such justification did not exist in this case. There was evidence that showed that Newbern was still in the doorway when appellant began shooting at him. The ballistics evidence and Irby's testimony both indicated that Newbern had barely entered the house. Newbern was found to be carrying only a set of keys. The jury reasonably could have rejected appellant's claim that he thought the keys were a knife. Appellant shot Newbern six times, and two of the bullet wounds were in Newbern's back. The angle of the wounds to the front of Newbern's body indicated that they consistent with having been fired at Newbern while he was lying on his back. A jury could reasonably have determined that appellant did not actually and reasonably believe that he was in imminent danger.

An unlawful killing is either murder or manslaughter, and the defining boundary between the two is malice. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) A second degree murder verdict presupposes malice. Second degree murder is defined as the unlawful killing of a human being with malice aforethought, but without other elements, such as willfulness, premeditation, and deliberation that would support a first degree murder conviction. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)

The jury here rejected willful and premeditated first degree murder, but found that appellant acted with malice. (CALJIC Nos. 8.10, 8.11, 8.20, 8.30, 8.31.)

The jury was given the definitions of express and implied malice. (CALJIC No. 8.11.) Express malice exists when the defendant manifests a deliberate intent to take away the life of a fellow human being. (*People v. Blakeley* (2000) 23 Cal.4th 82, 87.) Implied malice occurs "'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (*Ibid*; see also *People v. Lasko* (2000) 23 Cal.4th 101, 107.)

Under the particular facts of this case, we find there was substantial evidence from which the jury could have reasonably found appellant acted with malice. Appellant admitted he had been carrying the gun around for some time. There was evidence that Newbern left the house, and, after a slight hesitation, returned inside. He did no more than open the door when appellant began shooting at him. As stated previously, Newbern sustained two bullet wounds in the back, and Higashi testified that the angle of some of the wounds was consistent with having been fired at Newbern while he was lying on his back. The jury was fully instructed on both types of voluntary manslaughter but rejected the idea that malice was negated by a sudden quarrel or heat of passion or by an unreasonable belief in the need for self-defense. (CALJIC Nos. 8.40, 8.42, 8.43, 8.44.) Neighbor Irby testified there was an argument between appellant and Newbern, but appellant denied the argument occurred.

Substantial evidence supports the jury's verdict, and we decline to reduce appellant's offense to manslaughter.

VII. Probation

Appellant argues that his is an unusual case, and he requests this Court to rule that a grant of probation is warranted pursuant to section 1203, subdivision (e), and California Rules of Court rules 4.413 and 4.414. Appellant acknowledges that trial counsel did not make this request in the trial court. He claims that, since his trial

counsel failed to preserve this issue for appeal, he rendered ineffective assistance of counsel, and this Court should therefore address appellant's claims on the merits.

Section 1203, subdivision (e), provides in pertinent part that: "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] (2) Any person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted. . . ." Thus, section 1203, subdivision (e), gives trial courts the discretion to grant probation "in unusual cases . . . ," even when the defendant is presumptively ineligible.

Appellant's firearm use, however, excludes him from the purview of section 1203, subdivision (e). Section 12022.53, subdivision (g), states in pertinent part that "[n]otwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section." As discussed, appellant comes with the provision of section 12022.53, subdivision (d). Appellant's reliance on *People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822 is to no avail. That case preceded the enactment of section 12022.53, and the defendant was convicted of voluntary manslaughter rather than murder. (*Id*. at p. 832.) The trial court here was not free to consider any "unusual circumstances" in support of a grant of probation.[7]

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[7] Because any request for probation would have been futile, counsel was not ineffective for failing to make the request.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

_____, J.
DOI TODD

We concur:

_____, P.J.
BOREN

_____, J.
NOTT